

ANTHONY BLURTON
Claimant

LRM INDUSTRIES, INC.
Respondent

CONTINENTAL NATIONAL AMERICAN GROUP
Insurance Carrier

Admissibility of the videotapes and the nature and extent of disability are the only issues on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be affirmed.

Findings of Fact

1. Claimant was injured on September 13, 1995, while laying asphalt on a parking lot. A vehicle knocked claimant onto the asphalt and then ran over his legs.

2. The accident caused permanent injury to claimant's right lower extremity and to his back. The injury to the right lower extremity included a fracture of the distal fibula.

3. Dr. John W. Fanning, one of the treating orthopedic physicians, testified about the injury to claimant's right ankle and foot. Dr. Fanning treated claimant from December 21, 1995, when he took over treatment from Dr. Mark Humphrey, until March 14, 1996. In March 1996, claimant still complained of his ankle but there was no swelling, no increased warmth or erythema, and no popping or clicking. Range of motion was within normal limits. Dr. Fanning did not rate claimant impairment or recommend restrictions other than general restrictions as dictated by the symptoms. He testified he would need to have a functional capacity evaluation before he did an evaluation rating. Dr. Fanning did not treat claimant's back injury.

4. Dr. Richard G. Wendt treated and testified about claimant's back injury. Dr. Wendt first saw claimant on November 10, 1995, for complaints of thoracic and lumbar back pain. He recommended physical therapy, anti-inflammatory medication, and eventually work hardening. By letter dated April 26, 1996, Dr. Wendt provided respondent's insurance carrier with a rating of the impairment for the back injury:

Using the AMA Guides to the Evaluation of Permanent Impairment and taking into consideration through physical examination as well as evaluation in therapy that this patient lacks the ability to return to his previous occupation and lifestyle, I would give him an 18% permanent partial impairment of the whole person. I believe this relates to someone with soft tissue injury to the spine who runs some risk of degenerative problems later in life, who has been unable to return to his former lifting capacity and the heavy work situation that he was previously accustomed to, and who has lost some mobility in his spine at this time.

5. Dr. Wendt also recommended the following restrictions:

I believe he can lift from the floor to the waist, in the range of around 40 pounds on an occasional basis. As far as waist to shoulder or overhead lifting, he can lift up to 25 pounds on occasion. Again, he should not do this amount of lifting on a repetitive basis but he can do it on occasion. He can do most sitting and standing activities as long as he can intermittently do them and is not required to do a lot of repetitive flexion-extension of the thoracic or lumbar spine.

6. Dr. Wendt testified that if claimant showed more mobility, could lift more, or showed more flexibility, this would decrease his restrictions.

7. Respondent has offered four videotapes with video taken by four individuals. One of the videos was taken by Joe Bennett, one taken by Cecilia Hagenbuch, one contains video by both Cecilia Hagenbuch and video taken by Vicki Moore, and the fourth tape was taken by Dale Jackson. At oral argument, the parties agreed that the videotape by Dale Jackson was not submitted on time and should not be considered part of the record. The Board, therefore, has not viewed or considered the tape taken by Dale Jackson. The other three tapes remain in dispute.

8. The Board concludes the tapes taken by Mr. Bennett, Ms. Hagenbuch, and Ms. Moore should be admitted. The ALJ who decided this case did not see the claimant testify and, even if he had, it would be difficult to identify individuals on the tape, especially the tapes by Ms. Hagenbuch and Ms. Moore. The individual in the tape by Mr. Bennett probably could be identified. It is also true that the three individuals who took the tapes gave sometimes vague information about how they identified the claimant. Nevertheless, the Board concludes there was sufficient foundation to make the tapes admissible.

Mr. Bennett testified that he was assigned by respondent's insurance carrier to monitor claimant's activities. He was given a description of claimant as well as a tag number and description of claimant's vehicle. He was informed claimant was working at a restaurant in Lawrence, Kansas. He videotaped the person he believed to be claimant working. He heard the individual called "Tony." Finally, Mr. Bennett saw claimant, the same individual he taped, outside the Topeka hearing room at the time of claimant's hearing in this case.

Ms. Hagenbuch testified that she was shown the tape taken by Mr. Bennett before she took her tape. She also testified she was familiar with the claimant from work she had done as a Lawrence police officer. She also had a description of the claimant from another investigator who had gotten the description from respondent. Ms. Hagenbuch also observed claimant outside the same Lawrence restaurant where Bennett had taken the video of claimant. Ms. Hagenbuch also observed and videotaped claimant at 1810 Haskell Street. She testified she had first been told he lived at an address on New Jersey Street and then was able to locate him at the Haskell address. Claimant's wife testified in this case and testified that claimant lived at the New Jersey Street address, but she lived at the Haskell Street address.

Finally, Ms. Moore, who took a portion of the video, testified she was also familiar with claimant from when she worked at the Lawrence police department. She had been called to a disturbance and had seen a picture of claimant in her duties as a police officer. She testified claimant was the person in the video she took.

Although the identification of claimant in these videos is less than ideal, and the two former police officers had only seen claimant several years earlier, the Board concludes that the evidence establishes more probably than not that claimant is the person shown in the videos.

9. The videotapes indicate claimant is more flexible and mobile than he claims in his testimony. The videos show him using a pick ax, jumping in and out of the bed of a pickup, shoveling materials into a cement mixer, shoveling materials out of the back of the pickup, and loading materials, apparently scraps of metal, into the back of his truck.

10. In contrast to what is shown on the videos, claimant testified he has tried to do things but it is a matter of minutes before he has to stop. He cannot mow his own lawn. He tried to help a friend who is a brick mason. The heaviest thing he lifted was a couple of broken bricks. He is not able to make the bed as he used to. He has to bend over and straighten each corner.

11. The Board agrees with the conclusion reached by the ALJ that claimant has exaggerated the problems he has as a result of his injury. He has more flexibility and mobility than he has represented.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. Claimant's credibility is sufficiently damaged by the evidence in the videotapes that the restrictions recommended by Dr. Wendt are considered unreliable. Claimant has failed to meet his burden of proving the restrictions are appropriate and, accordingly, has failed to meet his burden of proving work disability.

3. Claimant has an 18 percent disability based on functional impairment. The functional impairment rating by Dr. Wendt might be subject to the same criticism as the restrictions, but the parties have stipulated to the functional impairment. Claimant is, therefore, awarded benefits for an 18 percent general body disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on March 4, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas R. Hill Overland Park, KS
Lawrence D. Greenbaum, Kansas City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director